IN THE HIGH COURT OF PUNJAB & HARYANA CHANDIGARH

Criminal Revn. No.504 OF 1995
Date of Decision: November 14, 2007

TARA CHAND

.....PETITIONER

VERSUS

STATE OF HARYANA

.....RESPONDENT

. . .

CORAM: HON'BLE MR. JUSTICE A.N.JINDAL

Present: M r. Tarundeep Kumar, Advocate for
Mr. Hemant Bassi, Advocate.

Mr. K.S.Godara, DAG, Haryana.

A.N.JINDAL, J

This petition is directed against the judgment dated 14.07.1995 passed by Additional Sessions Judge, Hisar dismissing the appeal of the petitioner against the judgment dated 13.07.1992 passed by JMIC, Hisar in case under Section 9 of the Opium Act wherein the accused was convicted and sentenced to undergo RI for a period of 2 years and to pay a fine of Rs. 1000/-.

The prosecution story as unfolded during trial is that on 24.04.1985 on receipt of secret information against the accused/petitioner(hereinafter referred to as the 'petitioner') ASI Kapoor Singh apprehended the petitioner near the pond in the area of village Chaudhary on suspicion

of keeping some contraband in his possession. On the search of the Peepa(tin box) carried by him on his right shoulder in the presence of a public witness Deepa, recovery of 10 KG of opium was affected out of which 50 grams was separated as sample and the remaining bulk opium as well as the sample were converted into parcels and were affixed with the seal of ASS. The sample was sent to the chemical examiner. On receipt of the report and on completion of the investigation; challan was presented against him.

Consequently, the petitioner was charged under Section 9 of the Opium Act to which he pleaded not guilty and claimed trial.

In order to substantiate the charge the prosecution examined ASI Baljeet Singh(PW1), Deepa(PW2), SI Harish Kumar(PW3) and ASI Kapoor Singh(PW4). After tendering into evidence the report of the chemical examiner and the affidavits, prosecution closed its case.

When examined under Section 313 Cr. P.C the accused denied all the allegations and pleaded his false implication in the case. He further added that he was taken away by the police from the house of one Nishan Singh in the presence of Ram Sarup and was falsely implicted in the case. However, no evidence was led in defence. Ultimately, the trial ended in conviction so as the appeal was also dismissed.

The arguments advanced by the counsel for the petitioner are that the report of the chemical examiner Ex. PX does not disclose the presence of meconic acid, the

essential ingredient to constitute opium so in the absence of the meconic acid or any other chemicals in the stuff sent to the Assistant Chemical Examiner(which were required to be recorded in the report) it cannot be concluded that the stuff so recovered from the accused was opium punishable under Section 9 of the Opium Act 1878.

Having given my thoughtful consideration to the aforesaid contentions, I find some substance in the same. The opium as defined in Section 3 of the Act is reproduced as under:-

In this Act, unless there be something repugnant in the subject or context 'opium' means:-

i) the capsules of the poppy(Papaver Somniferum L) whether in their original form or cut crushed or powdered and whether or not juice has been extracted therefrom;

ii)the spontaneously coagulated juice of such capsules which has not been submitted to any manipulations other than those necessary for packing and transport; and

iii)any mixture, with or without neutral materials, of any of the above forms of opium;

but does not include any preparation containing not more than 0.2 per cent of morphine, or a manufactured drug as defined in section 2 of the Dangerous Drugs Act. 1930."

On the cursory look of the aforesaid definition

of opium, it would be imperative to mention that though morphine was pointed out to be one of the constituents for treating the contraband as opium but there is not mention in the definition that morphine is the sole constituent and would be sufficient to term the same as 'opium' bringing within the purview of Section 3 of the Act. It also appears to the common sense that morphine may be present in ganja, heroine, medicine or other intoxicant preparations but by the presence of mere morphine the stuff cannot be termed to be the opium. It may further be observed that the coagulated juice of the capsules of the poppy from the plants of 'Papaver somniferum L' has been made an offence under the Act but the chemical examiner in his report has not stated anywhere if the said morphine was the coagulated juice from the capsules of poppy(Papaver somniferum L).

This preposition also came up for discussion before this Court as far back as in the Year 1992 when His Lordship Hon'ble Mr. Justice B.S.Nehra observed in case Khushal Chand v. State of Haryana 1992(3) RCR Criminal p-624 as under:-

> "According to the report Ex. PX of the chemical examiner, the sample of the contraband, which was taken out of the substance recovered from the petitioner, was analysed and it was found to contain 8.95% of morphine and on this basis the chemical Examiner opined that the sample was opium. The contention of the learned counsel for

the petitioner is that the presence of meconic acid in the sample, besides morphine, was also required to be proved by the prosecution and in the absence of such an evidence, the petitioner cannot be found guilty of having committed an offence under Section 9 of the Opium Act."

After considering the aforesaid contentions the learned Judge while relying upon the judgment delivered by the Division Bench of this Court in case Inder Singh v. State of Punjab, 1981 Chandigarh Law Reporter114 observed that prosecution must establish the presence of meconic acid to establish the fact that the contraband was opium.

While perusing the report of the Chemical Examiner Ex. PX, in the present case, it may be observed that he appears to have not applied his mind and did not mention as to what were the other contents of the stuff except that of morphine and what was the species of the morphine as detected in the stuff. He also did not mention if meconic acid was present or not.

That apart, it may be further observed that the offence was committed in this case on 24.04.1985. However, the sample was sent to the Chemical Examiner on 06.05.1985 and the Chemical Examiner prepared the report on 26.12.1985. No explanation is forthcoming as to why the prosecution committed this inordinate delay in sending the sample to the chemical examiner and also why delay of 7 months was committed by the chemical examiner in sending

the report.

It may further be observed that the official with whom the sample was deposited has not been examined to say that the sample with the seal bearing impression ASS was deposited with him. Thus the link evidence is missing in the case. The chemical examiner has also not mentioned as to through which constable the sample was deposited. Therefore, it cannot be said with certainty that the sample was deposited through Constable Pawan Kumar. The accused had also no opportunity to cross-examine Pawan Kumar as he was not tendered for cross-examination.

Consequently it would not unsafe to hold that prosecution has failed to bring the charge against the accused, beyond reasonable doubt.

As an upshot of the aforesaid discussions.

This revision petition is accepted. The impugned judgment is set aside and the petitioner is acquitted of the charge framed against him and is directed to be set at liberty. The bail bonds and surety bonds furnished by him are discharged and the fine, if any, deposited by him is ordered to be refunded.

(A.N.JINDAL)
JUDGE

November 14, 2007
Ruchika

To be referred to reporter: Yes/No